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No. 01-824

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

TAMKO ROOFING PRODUCTS, INC.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
LOCAL 1071L,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* CENTER ON NATIONAL LABOR POLICY, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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TAMKO ROOFING PRODUCTS, INC,
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LOCAL 1071L,
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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* BY THE CENTER ON NATIONAL LABOR POLICY, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

The Center on National Labor Policy, Inc. and the National Association of Manufacturers respectfully move pursuant to this Court's Rule 37(b) for leave to file their brief *amici curiae* in support of the position of Petitioner Tamko Roofing Products, Inc. Consent was sought from all parties but was not granted by the Respondent. All of these documents have been filed with the Clerk.

The accompanying brief urges this Court to grant *certiorari* in order to consider the important adverse effects of the decision of the United States Court of Appeals in *Tamko*

Roofing Products, Inc. v. Local 1071L United Steelworkers of America, No. 00-15168-DD (11th Cir. 2001) (per curiam).

The Center on National Labor Policy, Inc. (the "Center") is a public interest legal foundation chartered to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public consumers, taxpayers, and workers. As this Court recognized in *Connell Constr. Co. , Inc. v. Steamfitters Local Union No. 100*, 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers." When organized labor pressures are supported by a governmental policy permitting unremedied racial hostility in the workplace and repudiating an employer's attempt to eradicate racial discrimination in the workplace, as in the case at bar, significant questions are raised concerning the civil rights of other affected parties—the public, consumers, taxpayers, and workers.

The National Association of Manufacturers ("the NAM") is the nation's oldest and largest broad-based industrial trade association. It represents nearly 14,000 member companies and subsidiaries, including 10,000 small and mid-sized manufacturers, and 350 member associations serving manufacturers and employees in 50 states. NAM members produce goods in every industrial sector.

The NAM is concerned that the federal courts are enforcing local collective bargaining agreements which conflict with important federal policies that employers have an affirmative duty to comply with. The Court below exceeded its authority when it permitted an arbitrator to install his own upset the employer's prerogatives to impose its affirmative duty to apply federal law.

The *amici* believe that federal employment laws were designed to promote an atmosphere conducive to the exercise of productive and efficient methods of operation as well as promoting positive and civil employee work ethics. A federal policy permitting an arbitrator to impose conflicting obligations on employers in the circumstances of this case is of great concern to the *amicis'* members who will face repeated conflicting obligations and litigation as a result of the decision below.

Because the Center and the NAM can bring to this case a diverse perspective not presently represented, the *amici curiae* can assist the Court in obtaining full consideration of public interest issues.

Accordingly, the Center and the NAM respectfully

request leave to file the annexed brief *amici curiae*.

Respectfully submitted,

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BRIEF OF THE CENTER ON NATIONAL LABOR POLICY, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTION

Pursuant to Supreme Court Rule 37.2(a), the Center on National Labor Policy, Inc. and the National Association of Manufacturers submit this joint brief as *amici curiae* in support of the Petitioner.[1]

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[1]Letters of consent and denial have been filed with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written or produced by any person
(continued...)

INTEREST OF *AMICI CURIAE*

The Center is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor organizations and governmental entities. The Center believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions.

The National Association of Manufacturers ("the NAM") is the nation's oldest and largest broad-based industrial trade association. It represents nearly 14,000 member companies and subsidiaries, including 10,000 small and mid-sized manufacturers, and 350 member associations serving manufacturers and employees in 50 states.

Further background and interests of *amici* have been detailed in the preceding motion for leave to file this brief.

The *amici* jointly believe that the legal issues under review herein are extremely important to employers throughout the nation. The Eleventh Circuit's decision here imposes an undue burden on employers subject to an

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[1](...continued)
or entity other than the *amici curiae* or its counsel.

array of federal employment laws, including the National Labor Relations Act (the "Act"), that threatens employer rights and obligations set forth by Congress in numerous federal statutes.

ISSUES

The *amici* hereby adopt and incorporate by reference the Petitioner's Questions Presented.

STATEMENT OF THE CASE

The *amici* hereby adopt and incorporate by reference the Petitioner's Statement of the Case.

In addition, *amici* wish to stress that under normal circumstances where an arbitrator reviews, under a collective bargaining agreement, a reasonable decision by an employer to terminate an employee for racially harassing someone on company premises, deference is normally given by the federal courts. As is usual in such cases, the arbitrator must decide whether the harassment in fact occurred and whether the harassment justified disciplinary action by the employer. If it did, the arbitrator, under the collective bargaining agreement in effect in this case, has "no authority to substitute his judgment for that of the Company in respect to the appropriate degree of discipline." Pet. App. 40a-41a.

In this case, however, the arbitrator ruled that the company's anti-harassment policy was not stated clearly enough to prohibit harassment of non-employees. Without

a clearly stated company policy, the arbitrator believed the employer could not terminate the harasser. The arbitrator then ordered the employee reinstated, finding that the company could not discipline an employee unless the company's anti-harassment policy mentions third-party harassment as an offense. The arbitrator ordered the employee reinstated, with full backpay and without according him any discipline for his racial epithets.

The district court judge overturned this ruling, finding that a well-defined and dominant public policy against racial harassment in the workplace prohibits a court from enforcing the reinstatement order. The United States Court of Appeals for the 11th Circuit reversed, prompting this appeal.

SUMMARY OF ARGUMENT

The Petition presents a circuit court conflict concerning an issue of great public importance. The Petitioner, Tamko Roofing Products, Inc., has presented this Court with a compelling set of arguments outlining (1) a split in the Circuits, (2) the importance and recurring nature of the issue on appeal, and (3) the misapplication of the "public policy doctrine" by the Court of Appeals to the arbitrator's decision. As demonstrated in the Petition, the federal courts have simply abandoned the practice of evaluating the *bona fides* of a arbitration decisions that refuse to acknowledge an employer's action in compliance

with the employer's federal duties. By erecting a rule that writes out consideration of these employer duties and responsibilities, the lower courts place employers in untenable situations.

This Court has long recognized that an arbitration award may be set aside on the grounds that it violates law or public policy. *United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 39, 43 (1987); W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757, 766 (1983).

Employers subject to statutory liability on account of an arbitration decision must be able to set the award aside in federal court on the basis of these federal policies. At the very least, the arbitrator should accommodate the federal policy when prescribing a remedy, rather than denouncing the employer's legitimate interest in protection from outside litigation. *See Eastern Assoc. Coal Corp. v. UMWA, District 17,* 531 U.S. 57, 121 S. Ct. 462, 469 (2000).

The chilling effect of the circuit decision is compounded when the policy is one of denouncing racial harassment. This Court, the Congress, and the people of the United States through the Constitution have established the most stringent examination for such cases. Moreover, the Eleventh Circuit's new policy departs from instructions given in the cases cited above.

Absent review by this Court, the *amici* are greatly concerned that the balance of labor relations will be undermined by the decision below. As representatives of thousands of employers nationwide, *amici* fully support the arguments of the Petitioner, and urge this Court to grant a writ of *certiorari* to review the lower court's decision.

REASONS FOR GRANTING THE PETITION

I.

ABSENT REVIEW BY THIS COURT, THE DECISION BELOW WILL THREATEN EMPLOYER RIGHTS AND OBLIGATIONS TO COMPLY WITH POSITIVE FEDERAL LAW OUTSIDE OF UNION CONTRACT SETTINGS.

A. Introduction.

The case at bar not only affects companies with collective bargaining agreements—it affects arbitration awards in non-union settings—as well. This Court's recent experience in several cases involving a review of agreements between employers and employees that call for arbitration to resolve employment-related disputes outside of collective bargaining and union contract situations illustrates the importance of federal policy promoted under the Federal Arbitration Act. 9 U.S.C. § 1 *et seq.* *See Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001), *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S. Ct. 1401 (2001).

The nation's employers for many years have been embracing various alternatives to formal grievance procedures and the ensuing expense of litigation engendered by collective bargaining agreements. In non-union workplaces, which comprise the vast majority of employers nationwide, *amici* believe that arbitration is becoming a more common form of dispute resolution. *Statistics in Employment Suits, United States Department of Justice* (Oct 9, 2000)

Judging by the number of cases that have already been litigated through the courts of appeals, and which tripled from 1990-98, *id*, *amici* expect that arbitral awards in the non-union context will also be subject to review in the courts. It is thus vitally important that this Court resolve the conflict between the circuits over the extent to which an arbitrator can overturn an employer's disciplinary decision involving attempts to comply with federal law.

B. This Case Involves More Than an Employer's Action to Root Out Racial Harassment.

This case affects companies trying to comply with anti-discrimination laws involving employment related actions. Employer discipline in the workplace can result from an increasing number of federal, state and local statutes, regulations, permits and orders. There are at least 67 significant federal labor and employment laws of

general applicability to employers, and more are under discussion in Congress every year.[2]

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[2]1998 - Consumer Credit Reporting Reform Act; 1997 - Federal Fair Credit Reporting Act; 1997 - Taxpayer Relief Act of 1997; 1997 - Balanced Budget Act of 1997 (Retirement Plans); 1996 - Newborns' and Mothers' Health Protection Act; 1996 - Mental Health Parity Act of 1996; 1996 - Illegal Immigration Reform and Immigrant Responsibility Act of 1996; 1996 - Health Insurance Portability and Accountability Act of 1996; 1996 - Small Business Job Protection Act of 1996(Pension Simplification); 1996 - Minimum Wage Increase Act of 1996; 1994 - Budget Reconciliation Act; 1994 - The Pension Annuitants Protection Act of 1994; 1994 - Bankruptcy Reform Act of 1994; 1994 - Uniformed Services Employment and Reemployment Rights Act; 1993 - Family and Medical Leave Act of 1993; 1993 - Omnibus Budget Reconciliation Act of 1993 (Tax Changes to Retirement Plans); 1992 - Coal Industry Retiree Health Benefit Act of 1992; 1992 - Unemployment Compensation Amendments of 1993 (20% Withholding & Rollover) 1991 - Civil Rights Act of 1991; 1990 - Older Workers Benefit Protection Act; 1990 - Americans With Disabilities Act of 1990 (ADA); 1989 - Whistleblower Protection Act of 1989; 1988 - Employee Polygraph Protection Act of 1988; 1988 - Drug-Free Workplace Act of 1988; 1988 - Worker Adjustment and Retraining Notification (WARN) Act; 1986 - Tax Reform Act of 1986 (105(h),401(a)(26),401(k),401(m),410(b),415; 1986 - Immigration Reform and Control Act (IRCA) of 1986; 1986 - Omnibus Budget Reconciliation Act (OBRA) of 1986; 1986 - Age Discrimination in Employment (ADEA) Amendments of 1986; 1985 - Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA); 1984 - Retirement Equity Act of 1984 (REACT); 1984 - Deficit Reduction Act of 1984 (DEFRA); 1982 - Job Training Partnership Act (JTPA) 1982 - Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) 1980 - Multiemployer Pension Plan Amendments Act of 1980 (MEPPA); 1980 - Guidelines on Sexual Harassment; 1978 - Uniform Guidelines on Employee Selection Procedures; 1978 - Pregnancy Discrimination Act (PDA); 1978 - Labor Management

(continued...)

Any employer, and particularly a small or medium-sized employer, that wishes to comply with and cooperate with government authorities in the enforcement of these and other laws would be hard-pressed to develop workplace policies that adequately address them all, much

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[2](...continued)
Cooperation Act of 1978; 1974 - Privacy Act of 1974; 1974 - Employee Retirement Income Security Act of 1974 (ERISA) and 404 (c) Regs.
1973 - Rehabilitation Act of 1973 (Amended 1974, 1976,1984, 1986, 1991, 1992, 1993); 1972 - Vietnam Era Veterans' Readjustment Assistance Act of 1972; 1971 - Fair Credit Reporting Act (FCRA)
1971 - EEO Revised Order #4/Federal Contractors; 1970 - Occupational Safety and Health Act of 1970 (OSHA); 1968 - Consumer Credit Protection Act of 1968; 1968 - Fair Credit Reporting Act (FCRA); 1967 - Age Discrimination in Employment Act of 1967 (revised 1978); 1966 - Veterans' Readjustment Benefits Act of 1966; 1965 - Executive Order 11246 - Affirmative Action Plans; 1964 - Civil Rights Act of 1964 (amended 1968 &1972) (Equal Employment Opportunity Act of 1972); 1963 - Equal Pay Act of 1963; 1962 - Contract Work Hours and Safety Standards Act 1959 - Labor - Management Reporting and Disclosure Act (LMRDA) (Landrum-Griffin Act); 1947 - Labor - Management Relations Act of 1947/(Taft-Hartley)(amended 1974), 61 Stat. 136; 1947 - Portal-to-Portal Act of 1947 (Gwynne Act); 1938 - Fair Labor Standards Act of 1938 (amended 1949, 1955, 1961, 1966, 1974, 1977, 1985, 1989); 1938 - Holiday Pay Act, 52 Stat. 1246; 1936 - Byrnes Act, 49 Stat. 1899; 1935 - Social Security Act (amended approximately every 2 years), 49 Stat. 620; 1935 - Walsh-Healey Act (Public Contracts Act), 49 Stat. 2036; 1935 - National Labor Relations Act, 49 Stat. 449; 1933 - Unemployment Relief Act (Amended 1976,1992, 1993); 1932 - Norris-LaGuardia Act (Labor Disputes Act),47 Stat. 70; 1931 - Davis-Bacon Act, 46 Stat. 1497. and the 1918 - Minimum Wage Law, 40 Stat. 960.

less with the level of detail apparently required by the arbitrator here. Refusal to enforce an arbitration award on the grounds that it violates public policy is "rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 373 (1987).* The key question here is whether the decision under review" created any explicit conflict with other 'laws and legal precedents.'" *Id.* at 373 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757, 766 (1983)).

The body of arbitration decisions has generally reflected a recognizable restraint for ordering either party to a contract to perform an illegal act. In *Buckstaff, Co.*, 40 Lab. Arb. 833, 835 (1963), an arbitrator held he could not bring himself to render an opinion and award, which, if carried out, would result in both parties to the arbitration being guilty of unlawful conduct. There, the arbitrator refused to order the discharge of an employee in a situation that would place both the employer and the union in violation of the NLRA. *See also Ex-Cell-O Corp.*, 85 Lab. Arb. 1190 (1985) (agreement cannot be construed to permit a violation of the NLRA as construed by National Labor Relations Board opinions).

Similarly, in *IMC Chemical Group*, 73 Lab. Arb. 215 (1979), the arbitrator refused to permit the union to

undermine national labor policy by claiming a contract violation and seeking a remedy where it would either lead to an illegal arbitral award or "place the Company in the unreasonable predicament" of violating the arbitral award or federal employment law (Title VII).

In the present case, the issue presented for arbitration by the Union not only involved a contract interpretation, but required the arbitrator to make an award that would also accommodate the federal law requirements imposed on the Petitioner. *See Eastern Assoc. Coal Corp. v. UMWA, District 17*, 531 U.S. 57, 121 S. Ct. 462, 469 (2000). Court enforcement of an arbitration award where *no* alternative punishment is substituted for the employer's choice of discipline, must be denied as a violation of public policy, especially where fundamental civil precepts are involved.

As set forth below, neither an arbitrator nor a Union's grievance should be able to effect a result leaving an employer without reasonable grounds of defense to external liabilities and lawsuits.

II

AN ARBITRATOR MUST NOT SECOND-GUESS AN EMPLOYER'S REASONABLE DECISION IN RUNNING ITS BUSINESS.

Two fundamental policies of American jurisprudence have traditionally resolved many disputes involving the

workplace. These principles serve important policy goals and should be guarded against erosion. Only the clearest of statutes or public policies can justify any loss in their general applicability. The decision below threatens these policies applicable to almost 90% of the nation's workers.

First, the "at-will" employment doctrine recognizes that, absent a statutory, contractual or other legal prohibition, an employee serves at the will of the employer. *Crocker v. Piedmont Aviation*, 49 F.3d 735 (D.C. Cir. 1995). No job is guaranteed for life, without a statutory basis or a contract. Any other rule would impede the ability of companies to secure financing, to endure the normal ebb and flow of business cycles, and to take economic risks.

Employees themselves benefit from the entrepreneurial freedom that the at-will doctrine engenders. While some jobs may turn out to be temporary, others may flourish and blossom, benefiting workers, employers, investors and their communities.

Second, the "business judgment rule" recognizes that, absent a statutory, contractual or other legal prohibition, employers must be able to make choices regarding the conduct of their business without interference from the courts. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525 (1984); *Scamardo v. Scott*, 189 F.3d 707, 711 (8th Cir. 1999). Employers often confront the very difficult task of

navigating the myriad economic, social, political and legal risks and requirements that buffet them about. The business judgment rule requires that courts allow entrepreneurs to succeed or fail on their own, absent a strong public policy reason to intercede.

Moreover, the collective-bargaining agreement in this case provided for termination "for cause," but did not specify all the situations that constitute "cause." It is within the proper judgment of the company to make an initial determination of a reasonable cause for termination, subject to review under the terms of the agreement. An "arbitrator may not ignore the plain language of the contract." *Misco, Inc.*, 484 U.S. at 38.

Applying both the at-will doctrine and the business judgment rule to the circumstances of the racial harassment in this case, counsels in favor of a moderate, circumspect approach by the arbitrator and the courts. An employer must have the discretion to develop personnel policies and workplace standards as general or as specific as it wants. An employer should not be restricted from taking action against employees that violate generally accepted norms of behavior, whether such norms are specifically enumerated in writing or not.

No employer should have to assume as a bargaining obligation the requirement to specify in a contract, personnel manual or other written document standards of

behavior, including compliance with the thousands of laws and regulations that apply to personal behavior of its employees, both on and off the job. No employer should have to specify, for example, that murderers may not be able to maintain their employment with the company. No personnel manual should have to explicitly state that aliens who lose their work authorization may lose their jobs. And no company's harassment policy should have to spell out all the situations where the company is authorized to impose sanctions, including termination. This is particularly true in the collective-bargaining context, as such requirements would inject an unnecessary and burdensome level of detail and complexity into an already difficult process.

The arbitrator in this case issued a cramped and narrow interpretation of Tamko's anti-harassment policy that ignored the possibility that the company could discipline an employee for situations not expressly spelled out in the policy. The Court of Appeals compounded this error by giving excessive power to an arbitrator to adopt any remedy that itself is not illegal. Pet. App. 3a. It recognized that courts should generally defer to the judgment of labor arbitrators, but refused to acknowledge that arbitrators should similarly defer to the reasonable business judgment of employers in at-will employment situations. A writ of *certiorari* should be issued to

reinforce the primary legal doctrine that should be taken into account in such situations.

III.

THE DECISION BELOW SPLINTERS EMPLOYER DUTIES TO COMPLY WITH PUBLIC POLICY DICTATES AND COMPLIANCE INCENTIVES IN THE ENFORCEMENT OF FEDERAL LAWS AGAINST DISCRIMINATION.

As important as it is for employers to have the flexibility to run their businesses without improper judicial oversight, they must also be able to understand and apply the multitude of anti-discrimination laws of this country. By the same token, arbitrators and the federal courts that review their decisions must develop as uniform an understanding of the law as possible. Any other system would leave employers and employees confused about their rights and responsibilities, and would tend to deter employers from adopting strong policies that implement the intent of Congress. This Court holds the unique compass that guides errant arbitrators and appellate courts that review their rulings.

The Court of Appeals' ruling below traps Tamko, and similarly situated employers, in an untenable position. While arbitration is intended to streamline the process of dispute resolution, most employers would just as soon

avoid the process altogether if they can agree with their employees over the proper result in a particular case.

Petitioner has documented several cases in which courts have found companies liable for discrimination against third parties under 42 U.S.C. §1981. Pet. at 22. The petition notes other cases showing that Tamko might be liable for workplace discrimination claims brought by other workers who could claim that taking no action against the harasser here creates an unlawful hostile work environment. *Id.* Yet, the arbitrator issued a ruling that ignored these legalities and focused solely on one sentence of Tamko's Prevention of Harassment Policy relating to harassment against co-workers. He ignored a subsequent sentence that states, "It is TAMKO's policy that *no form of harassment* should be present in the workplace." (emphasis added).

If this arbitrator's decision is allowed to stand, an employer with an employee that is racially harassing third parties has two choices: (1) terminate the employee and take its chances with the arbitrator, or (2) impose some lesser sanction, if any, and take its chances with other employees or the third-party contractor. Either way, the employer faces litigation for making a decision to voluntarily comply with anti-discrimination laws.

But "[v]oluntary compliance with Title VII also is an important public policy. Congress intended cooperation

and conciliation to be the preferred means of enforcing Title VII." *W.R. Grace & Co.*, 461 U.S. at 770-71. Plainly, the federal courts have the expertise to recognize the importance of these interests.

It is particularly important, in situations where the interests of a variety of parties conflict, that this Court provide a measure of rationality and balance to employers that want to act aggressively enough to prevent racial harassment in the workplace. Not all arbitrators possess this expertise, but their decisions must be held accountable for considering (if not understanding) the legal requirements of statutes with which companies must comply. We are not suggesting that public policy requires that an employer terminate an employee in the circumstances of this case; rather, we are suggesting that an arbitrator should understand that termination is a reasonable response by an employer in this situation.

The present decision, however, shifts the balance of American labor relations by forcing employers to shoulder the entire responsibility of acting in compliance with dictated public policies. An arbitrator's wilful rejection of these burdens is a rejection of public policy.

CONCLUSION

For these reasons, and for each of the reasons set forth in greater detail in Tamko Roofing Product, Inc.'s Petition, *amici curiae* respectfully request that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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